

FEDERAL ELECTION
COMMISSION
SECRETARIAT

SENSITIVE
FEDERAL ELECTION
COMMISSION

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2014 AUG 22 AM 9: 16

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6603
DATE COMPLAINT FILED: June 29, 2012
DATE SUPPLEMENT FILED: July 10, 2012
DATE OF NOTIFICATION: September 8, 2011
LAST RESPONSE RECEIVED: August 28, 2012
DATE ACTIVATED: September 13, 2012

ELECTION CYCLE: 2012
EXPIRATION OF SOL:
June 18, 2017 (earliest)
June 23, 2017 (latest)

COMPLAINANT: Mark A. Wohlander
RESPONDENTS: Patriot Majority USA
Ben Chandler for Congress and R. Wayne Stratton
in his official capacity as treasurer

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)(7)(B)(iii)
2 U.S.C. § 441b(a)
11 C.F.R. § 109.21
11 C.F.R. § 109.23

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

Just days after a candidate's committee placed a silent montage of video footage of the candidate from a prior election cycle on a publicly available internet site, a third party incorporated that footage into an advertisement favoring the candidate and broadcast it on television. We address here whether this series of events provides reason to believe that the third party republished campaign material and whether the parties may have coordinated their activity.

1 We conclude that there is reason to believe that the third party republished the campaign
2 material. And because the particular circumstances here tend to support a reasoned inference
3 that the parties may have coordinated their activities in doing so, we further conclude that there
4 is reason to believe that the campaign knowingly accepted an in-kind contribution as a result.

5 * * *

6 The Complaint alleges that Patriot Majority USA ("Patriot Majority"), a 501(c)(4)
7 organization and an alleged independent-expenditure-only political committee, made a
8 prohibited in-kind contribution to Ben Chandler for Congress ("Chandler Committee") when it
9 republished the Committee's 2010 campaign materials in a 2012 advertisement that was
10 allegedly coordinated with the Committee.¹

11 The record reflects that Patriot Majority aired three similar television advertisements that
12 contained video footage obtained from three candidates' principle campaign committees — the
13 Chandler, John Barrow, and David McKinley Committees — that had served as "campaign
14 material" for each of those campaigns. Patriot Majority's republication of that campaign
15 material in its advertisements therefore gives rise to an in-kind contribution to each of the
16 Committees under the Commission's republication regulation.² And because the record further
17 supports the contention that Patriot Majority may be a corporate entity, we recommend that the
18 Commission find reason to believe that Patriot Majority violated 2 U.S.C. § 441b(a) by making
19 prohibited in-kind contributions to the Committees when it republished those campaign
20 materials.

¹ Compl. at 1-2, 3-4 (Jun. 29, 2012). The Complaint also includes information indicating that Patriot Majority aired two similar advertisements in 2012 that featured footage of Representatives John Barrow and David McKinley that allegedly constituted campaign materials of Barrow and McKinley. *See id.*, Attach.

² 11 C.F.R. § 109.23.

1 As to the allegation that the Chandler Committee and Patriot Majority coordinated the
2 communication, the Complaint asserts that the Chandler Committee publicly posted then
3 removed its video footage within a 24-hour period, while Patriot Majority produced and then
4 aired the television advertisement using that footage only a few days later.³ It does not appear
5 that the Chandler Committee in fact removed its video footage as alleged, and to this date the
6 footage remains available. Nonetheless, the five-day period between the Chandler Committee's
7 initial posting of previously aired video footage that served no obvious campaign purpose and
8 Patriot Majority's procurement of television air time and production of a commercial
9 advertisement including that footage as part of a series of similar advertisements involving
10 different candidates fairly suggests that the Chandler Committee may have communicated with
11 agents of Patriot Majority about the advertisement, and if so, that the Chandler Committee may
12 have engaged in conduct that would satisfy the Commission's coordinated communications test.
13 Accordingly, we recommend that the Commission find reason to believe that Patriot Majority
14 made, and the Chandler Committee knowingly accepted, a prohibited in-kind contribution in
15 violation of 2 U.S.C. § 441b(a), which the Chandler Committee failed to report in violation of
16 2 U.S.C. § 434(b).

17 **II. FACTS**

18 Patriot Majority represents that it is a non-profit organization that is tax exempt under
19 section 501(c)(4) of the Internal Revenue Code.⁴ From June 18 to June 24, 2012, Patriot
20 Majority aired three 30-second television advertisements "applaud[ing] United States
21 Representatives John Barrow, Ben Chandler, and David McKinley for voting to preserve

³ Compl. at 1.

⁴ Patriot Majority Resp. at 1. (Aug. 27, 2012).

1 Medicare and opposing the Ryan Plan that essentially ends Medicare.”⁵ The language used in
2 each of the three advertisements is identical, except for the name of the federal officeholder. For
3 example, the advertisement featuring Chandler, entitled “Affordable,” states:

4 For her, it’s about affordable prescriptions. For him, it’s a critical lifeline
5 after a lifetime of hard work. But some in Washington want to end
6 Medicare. Ben Chandler said no way. Chandler fought against raising the
7 eligibility age for Medicare. Prevented a new Medicare doughnut hole.
8 And opposed those who’d increase costs on seniors by six thousand a
9 year. Tell Ben Chandler to keep fighting to protect Medicare and balance
10 the budget right away.⁶

11
12 Seventeen seconds of each 30-second advertisement consists of identical stock footage.
13 The rest of each advertisement (from ten to 13 seconds) features footage of either Chandler,
14 Barrow, or McKinley. In “Affordable,” footage of Chandler talking to individuals, a group, and
15 a law enforcement officer comprises 13 seconds of the 30-second advertisement.⁷

16 Patriot Majority concedes that it obtained the Chandler footage for “Affordable” from the
17 Chandler Committee’s YouTube channel.⁸ Five days before the advertisement first aired, on
18 June 13, 2012, the Chandler Committee posted seven video clips to that channel.⁹ Each clip lasts
19 about ten seconds and shows Chandler interacting with various members of the community.
20 None of the clips contains any audio or other narration. The footage in three of the seven clips

⁵ See Compl., Attach. The advertisements can be viewed at <http://www.patriotmajority.org/media/tvads>.

⁶ *Id.*

⁷ *Id.*

⁸ See Compl. at 1; Patriot Majority Resp. at 2.

⁹ The Complaint alleges that the Chandler Committee removed these video clips from YouTube “later on June 13,” Compl. at 1-2, but Respondents deny that allegation, *see* Patriot Majority Resp. at 3; Chandler Committee Resp. at 2 (Aug. 27, 2012), and the seven clips remain on the Chandler YouTube channel as of August 18, 2014.

1 came from advertisements that the Chandler Committee ran in 2010 in connection with
2 Chandler's 2010 election campaign.¹⁰

3 On June 18, 2012, Patriot Majority began airing the "Affordable" advertisement featuring
4 four of those video clips on television.¹¹ In those clips, Chandler is shown talking with a law
5 enforcement officer, a farmer, a person sitting on a truck, and a group. The narration in three of
6 the four sections of "Affordable" identifies Chandler while the on-screen text displays
7 Chandler's name, starting at his first appearance until the final screen image when Patriot
8 Majority's disclaimer appears.¹² The Complaint alleges that Patriot Majority spent \$45,375 on
9 "Affordable."¹³

10 Patriot Majority also concedes the Complaint's allegation that it ran advertisements
11 similar to "Affordable" regarding Representatives Barrow and McKinley.¹⁴ Patriot Majority's
12 advertisement featuring Representative Barrow is called "Lifeline."¹⁵ Footage of Barrow
13 comprises ten of the 30 seconds of the advertisement. Similar to "Affordable," the footage of
14 Barrow in "Lifeline" is divided into four segments and includes Barrow talking with a group, an
15 individual, a construction worker, and other workers as they walk along a wharf (the "Barrow

¹⁰ Those three clips — called, "Chandler Farmers," "Chandler Truck Chat," and "Chandler with Crowd 03," appear in advertisements that the Chandler Committee broadcast in 2010 called "Chandler Home Run," "Chandler Kentucky First," and "Jill's Testimonial – Ben Chandler," which also are posted on the Chandler Committee's YouTube channel. See <http://www.youtube.com/user/reelectbenchandler>.

¹¹ Compl. at 1-2. The video clips are "Chandler Police QuickTime H 264," "Chandler Farmers QuickTime H 264," "Chandler Truck Chat QuickTime H 264," and "Chandler with Crowd 03 Quick Time H 264."

¹² See http://patriotmajority.org/media/tvads?video_id=31.

¹³ Compl. at 2. The Complaint cites an article that asserts that the airtime for the "Affordable" ad cost \$43,375. See Nick Storm, *Democratic Group's Ads Back Chandler over Medicare while Using Familiar Footage*, mycn2.com (Jun. 20, 2012), <http://mycn2.com/politics/democratic-group-s-ads-back-chandler-over-medicare-while-using-familiar-footage>.

¹⁴ Compl., Attach.; Patriot Majority Resp. at 1-2.

¹⁵ See http://patriotmajority.org/media/tvads?video_id=32.

1 footage"). Also like the "Affordable" advertisement, the narration in three of the four sections
2 identifies Barrow while text displays Barrow's name from his first appearance until the final
3 screen image where Patriot Majority's disclaimer appears. Although Patriot Majority's
4 Response acknowledges airing "Lifeline," it does not state where it obtained the footage of
5 Barrow.¹⁶

6 Like Chandler, the Barrow Committee also operates a YouTube channel.¹⁷ The Barrow
7 footage that appears in Patriot Majority's "Lifeline" advertisement is included in a 30-second
8 video clip entitled, "Street." "Street" was uploaded to the John Barrow YouTube channel on
9 June 28, 2010, and contains the disclaimer, "Paid for by Friends of John Barrow. Approved by
10 John Barrow."¹⁸

11 Patriot Majority also acknowledges that it ran an advertisement featuring Representative
12 McKinley called "Critical."¹⁹ That advertisement is 30-seconds long and features ten seconds of
13 footage of McKinley. "Critical" consists of four segments: McKinley talking to a person while
14 descending steps, McKinley alone, McKinley followed by overhead footage of McKinley and

¹⁶ Patriot Majority Resp. at 1-2.

¹⁷ See <http://www.youtube.com/user/teambarrowgal2?feature=watch>. The channel contains twelve campaign videos in support of Representative Barrow, which include the disclaimer "Paid for by Friends of John Barrow. Approved by John Barrow." Three videos were uploaded during the 2010 election cycle and the remaining videos were uploaded in 2012. The channel also includes links to the Barrow for Congress website and Representative Barrow's Twitter and Facebook page.

¹⁸ See http://www.youtube.com/watch?v=Mvu_qPOwSfg. *Id.* There is a second video on the Barrow YouTube channel called "John Barrow for Congress" that also contains images matching those in "Lifeline." See <http://www.youtube.com/watch?v=Gg-cR8u7xd0>. That video clip was uploaded to the YouTube channel on June 19, 2012, however, the day *after* Patriot Majority aired its three advertisements concerning Barrow. *Id.* That video clip is 88 seconds long and features several frames of repeating video images of Barrow with no audio. It does not include a disclaimer. *Id.*

¹⁹ See http://patriotmajority.org/media/tvads?video_id=30.

1 three others, and concluding footage of McKinley intermixed with stock footage (the "McKinley
2 footage").²⁰

3 The YouTube channel for the McKinley Committee²¹ contains two video clips containing
4 the same footage of McKinley used in "Critical." The first, called "The Greatest
5 Generation.mp4," is a 30-second clip that includes the disclaimer "Paid for by McKinley for
6 Congress. Approved by David McKinley," and was uploaded on September 15, 2010.²² That
7 clip features the same footage of McKinley shown in "Critical" — McKinley talking to an
8 individual as they descend steps, McKinley alone facing the screen, and later images of
9 McKinley alone at a desk. The second video clip, "Had Enough?," is also 30-seconds with a
10 disclaimer for "McKinley for Congress" that was uploaded to the McKinley Committee's
11 YouTube channel on August 20, 2010.²³ "Had Enough?" contains the same footage of
12 McKinley shown in two portions of "Critical" — footage of McKinley sitting at a table talking
13 with a group of men and McKinley sitting alone.²⁴

14 Notwithstanding its concession that it "obtained all video excerpts that feature Rep.
15 Chandler from his publicly available YouTube channel,"²⁵ Patriot Majority denies that it
16 republished the Chandler footage because that footage was merely incidental to the "Affordable"
17 advertisement, contained no discernible message of its own, and was used only as background

²⁰ *Id.*

²¹ See <http://www.youtube.com/user/McKinley4Congress?feature=watch>.

²² See <http://www.youtube.com/watch?v=IMRUXjuWtpY&list=UUvPnchWnsPnZPgQWcUmel-g>.

²³ See <http://www.youtube.com/watch?v=IWah9pAluVk&list=UUvPnchWnsPnZPgQWcUmel-g&index=7&feature=plcp>.

²⁴ *Id.*

²⁵ Patriot Majority Resp. at 3.

1 imagery.²⁶ Respondents also argue that the Complaint failed to set forth any facts showing they
2 engaged in any coordinated conduct relating to the communication.²⁷

3 **III. ANALYSIS**

4 **A. There Is Reason to Believe that Patriot Majority Made Prohibited In-Kind**
5 **Corporate Contributions When It Republished Campaign Materials**

6
7 1. Patriot Majority Made In-Kind Contributions by Republishing Campaign
8 Materials

9
10 Under the Act, "the financing by any person of the dissemination, distribution, or
11 republication, in whole or in part, of any broadcast or any written, graphic, or other form of
12 campaign materials prepared by the candidate, his campaign committees, or their authorized
13 agents shall be considered to be an expenditure."²⁸ The republication of campaign materials
14 prepared by a candidate's authorized committee is also "considered a[n in-kind] contribution for
15 the purposes of contribution limitations and reporting responsibilities of the person making the
16 expenditure,"²⁹ because the person financing the communication has "has provided something of
17 value to the candidate [or] authorized committee."³⁰

²⁶ *Id.* at 4-5.

²⁷ *Id.* at 3-4.

²⁸ 2 U.S.C. § 441a(a)(7)(B)(iii). For republication, the Commission has concluded that "campaign materials" include any material belonging to or emanating from a campaign. *See, e.g.*, MUR 5743 (Betty Surton) (candidate photo obtained from campaign website); MUR 5672 (Save American Jobs) (video produced and used by candidate's campaign subsequently hosted on association's website).

²⁹ 11 C.F.R. § 109.23.

³⁰ *See Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 442 (Jan. 3, 2003) (explanation and justification) ("Coordinated and Independent Expenditures E&J"). As the Commission there explained, "Congress has addressed republication of campaign material through 2 U.S.C. § 441a(a)(7)(B)(iii) in a context where the candidate/author generally views the republication of his or her campaign materials, *even in pari*, as a benefit" and "can be reasonably construed only as for the purpose of influencing an election." *Id.* at 443(emphasis added); *see also* *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,191 (Jun. 8, 2006) (explanation and justification), ("Coordination E&J") (communications "that disseminate, distribute, or republish campaign materials, no matter when such communications are made, can be reasonably construed only as for the purpose of influencing an election.").

1 The Commission created an exemption for grassroots activity on the internet that allows
2 individuals to republish campaign materials available on the internet without making a
3 contribution or expenditure.³¹ The exception, however, does not exempt from the definition of
4 "contribution" any "public communication" that involves the republication of such materials.³²
5 For example, a contribution would result "if an individual downloaded a campaign poster from
6 the Internet and then paid to have the poster appear as an advertisement in the New York
7 Times."³³

8 Here, Patriot Majority republished campaign materials produced by the Chandler,
9 Barrow, and McKinley campaigns when Patriot Majority aired the "Affordable," "Lifeline," and
10 "Critical" advertisements, all three of which constitute public communications. Patriot
11 Majority's three 30-second communications appear to contain ten to 13 seconds of video images
12 obtained from the YouTube channels of the Chandler, Barrow, and McKinley committees. By
13 republishing this footage, Patriot Majority made in-kind contributions to Chandler for Congress,
14 McKinley for Congress, and Friends of John Barrow.³⁴

15 Nonetheless, the Respondents contend that Patriot Majority's use of the Chandler footage
16 does not constitute republication because that footage is publicly available, an "incidental" part
17 of the relevant advertisement, and served merely as background for the advertisement.³⁵ As to

³¹ See 11 C.F.R. §§ 100.94, 100.155 (uncompensated internet activity does not result in a contribution or expenditure); Internet Communications, 71 Fed. Reg. 18,589, 18,604 (Apr. 12, 2006) (explanation and justification).

³² A "public communication" is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general political advertising. 11 C.F.R. § 100.26.

³³ See 71 Fed. Reg. at 18,604.

³⁴ See 11 C.F.R. § 109.23(a).

³⁵ Patriot Majority Resp. at 4; Chandler Comm. Resp. at 3.

1 the assertion that the materials were obtained from public sources, that argument misses the
2 mark: the republication regulation focuses on the further dissemination of any material
3 belonging to or derived from a candidate's campaign, wherever obtained.³⁶ Moreover, in its
4 2003 rulemaking, the Commission specifically rejected a request to adopt a "public domain"
5 exception to republication, explaining that "virtually all campaign material that could be
6 republished" may be considered in the public domain, and therefore such an exception could
7 "swallow the rule."³⁷

8 Similarly, even accepting the validity of the assertion that the use of campaign material
9 here was merely incidental, the Commission has previously determined that materials are
10 republished under the Act even when the value of the republication is *de minimis* or the
11 republished portion is an incidental part of the communication.³⁸ In such cases, the *de minimis*
12 or incidental nature of the republication is considered in determining the appropriate
13 Commission response to the violation, not whether a violation has occurred. But the campaign
14 materials here were not an incidental part of Patriot Majority's advertisements in any event.
15 Rather, the campaign footage comprises ten to 13 seconds of each 30-second communication.
16 Further, in each the footage produced by the campaign is the *only* visual depiction of the relevant

³⁶ See, e.g., MUR 5743 (Betty Sutton) (candidate photo obtained from publicly available campaign website); MUR 5672 (Save American Jobs) (video produced and used by candidate's campaign subsequently hosted on association's website); MUR 5996 (Tim Bee) (candidate photo obtained from candidate's publicly available website). Further, the "publicly available source" safe harbor applies to whether republished campaign materials constitutes a coordinated communication, see 11 C.F.R. § 109.21(d)(2), (d)(3), not whether campaign material was republished under 11 C.F.R. § 109.23.

³⁷ Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 442-43.

³⁸ See MUR 5743 (Betty Sutton) (Commission admonished a committee after determining that a republished candidate photo was incidental and likely *de minimis* value); MUR 5996 (Tim Bee) (Commission exercised prosecutorial discretion to dismiss the allegation that a group republished photo of a candidate that comprised two seconds of a 30 second ad, and was downloaded at no charge from candidate's publicly available website). More recently, the Commission has been equally divided as to whether republication exists if the use is deemed incidental. See, e.g., MUR 6667 (Friends of Cheri Bustos); MUR 6617 (Christie Vilsack for Iowa).

1 candidate that is the subject of the communication. As such, the footage appears to constitute a
2 core component of the advertisement and is hardly incidental.

3 Patriot Majority also argues that "the mere use of footage 'to create [one's] own message'
4 is not 'republication' under the Act or Commission regulations."³⁹ Similarly, the Chandler
5 Committee argues that Patriot Majority used the Committee's footage to create an advertisement
6 that "was clearly Patriot Majority's own speech, not the parroting of any campaign message,"⁴⁰
7 and thus the "Affordable" advertisement qualifies for an exception to the republication rule.⁴¹
8 But here, much of the video footage of Chandler obtained from the Committee remains
9 unchanged in the Patriot Majority advertisement,⁴² and unlike a photo that is fleetingly displayed
10 in a subsequent communication, that unaltered video footage constitutes a central part of the
11 advertisement. Moreover, any subsequent republication of campaign material by a third party
12 could be said to constitute the republisher's "own message;" thus, to construe the Act and
13 regulations so narrowly would render republication a nullity. Indeed, the Commission observed
14 as much in its related rulemaking proceedings when it rejected an analogous "fair use" proposal

³⁹ Patriot Majority Resp. at 5 (quoting Statement of Reasons, Comm'rs. Hunter, McGahn & Petersen at 8, MUR 5879 (Democratic Congressional Campaign Committee)). Patriot Majority relies for its argument on the Commission's treatment of republication in MURs 5879 (Democratic Congressional Campaign Comm.) and 6357 (American Crossroads). See Patriot Majority Resp. at 5-6. The Commission was equally divided whether to conciliate in MUR 5879 or to find reason to believe in MUR 6357 on a republication theory. Cf. Statement of Reasons, Comm'rs. Weintraub, Bauerly & Walther at 1 n.1, MUR 6357 (American Crossroads).

⁴⁰ Chandler Comm. Resp. at 3.

⁴¹ See 11 C.F.R. § 109.23(b)(4) (the use of "campaign material [that] consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views" does not constitute a contribution to the candidate that originally prepared the materials).

⁴² Patriot Majority's "Affordable" advertisement republishes approximately five out of eight-seconds of the Chandler Committee's "Truck Chat" video and approximately five out of 11-seconds of the Committee's "Chandler with Crowd 3" video; *supra* note 12.

1 that would permit republication of "limited portions of campaign materials *for analysis and other*
2 *uses,*" reasoning that such an approach "could swallow the rule."⁴³

3 Nor do the facts presented here satisfy the regulatory exception for briefly quoted
4 materials at any rate. The video footage of the candidates that Patriot Majority used to create the
5 advertisements does not quote any material that demonstrates the candidates' views on any issue,
6 either through words or imagery. Moreover, the Committee's material that Patriot Majority
7 republished was not quoted briefly. Patriot Majority used between ten and 13 seconds of each
8 candidate's own campaign footage in advertisements that were only 30-second in length, and all
9 of the video footage of Chandler, Barrow, and McKinley came entirely from the Committees'
10 previously existing campaign materials. In this, the Commission must read the exception for
11 briefly quoted material in a manner consistent with the Act's mandate that circulating a
12 candidate's "written, graphic, or other form of campaign materials" — even "*in part*" —
13 constitutes a benefit to the campaign and thus an actionable republication of campaign
14 materials.⁴⁴

15 For these reasons, we recommend that the Commission find that, by including campaign
16 materials of Chandler, Barrow, and McKinley in advertisements supporting those candidates,
17 Patriot Majority made in-kind contributions to each of their campaign committees under the
18 republication provisions of the Act and the Commission's implementing regulations.

⁴³ Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 443 (emphasis added).

⁴⁴ 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added); Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 442-43 (acknowledging that Congress concluded that republication even in part provides a benefit to the candidate).

1 2. Patriot Majority Made Prohibited Corporate Contributions
2

3 The Complaint claims that Patriot Majority is an independent expenditure-only political
4 committee and was therefore prohibited from making contributions in any amount to federal
5 candidates such as Chandler, Barrow, and McKinley.⁴⁵ Patriot Majority, however, is not
6 registered with the Commission as a political committee. A separate entity called "Patriot
7 Majority PAC" is registered with the Commission as an independent expenditure-only
8 committee; Patriot Majority USA — the entity that aired the advertisements and the Respondent
9 here — is not. Consistent with its non-political committee status, Patriot Majority has reported
10 its independent expenditures to the Commission on FEC Form 5, which is used by persons other
11 than political committees.⁴⁶ Accordingly, it appears that Patriot Majority is as an entity other
12 than a political committee.

13 The available public information also indicates that Patriot Majority is a corporation.
14 Although Patriot Majority asserted in its Response and in a press release announcing the
15 Chandler, Barrow, and McKinley advertisements that it is a section 501(c)(4) non-profit
16 organization, Patriot Majority indicated on its 2011 Form 990 that it is a corporation.⁴⁷ The Act
17 and Commission regulations prohibit a corporation from making a contribution in connection

⁴⁵ Compl. at 2 (citing Advisory Op. 2010-11 (Commonsense Ten)).

⁴⁶ See, e.g., <http://docquery.fec.gov/pdf/849/12952251849/12952251849.pdf>.

⁴⁷ Patriot Majority Resp. at 1; Compl., Attach; Patriot Majority USA, IRS Form 990, Line K (filed Nov. 15, 2012), available at http://990s.foundationcenter.org/990_pdf_archive/450/450710294/450710294_201112_990O.pdf. We note that there are two organizations incorporated in Washington, D.C. that use the name Patriot Majority. The first, Patriot Majority USA, registered on March 21, 2011, before the three ads aired. The second, Patriot Majority, registered on July 9, 2012, after the ads aired and lists as its registered agent Craig Varoga — the president of Patriot Majority USA.

1 with a federal election.⁴⁸ We therefore recommend that the Commission find reason to believe
2 that Patriot Majority violated 2 U.S.C. § 441b(a) by making prohibited corporate contributions to
3 the Chandler, Barrow, and McKinley campaigns.

4 **B. The Chandler Committee Accepted a Coordinated, In-Kind Contribution**
5 **from Patriot Majority**
6

7 Under the Act, a political committee may not “knowingly accept” a contribution made in
8 violation of the prohibition against corporate contributions.⁴⁹ Although there is reason to believe
9 that Patriot Majority made prohibited in-kind corporate contributions to the Chandler Committee
10 by republishing Chandler campaign materials, the Chandler Committee is not considered to have
11 knowingly accepted those prohibited in-kind contributions for purposes of the Act unless the
12 “Affordable” advertisement qualifies as a coordinated communication under the Commission’s
13 coordination regulations.⁵⁰

14 A communication is coordinated with a candidate, a candidate’s authorized committee, or
15 agent of the candidate or committee when the communication: (1) is paid for by a person other
16 than that candidate or authorized committee (the “payment prong”); (2) satisfies at least one of
17 the content standards set forth in 11 C.F.R. § 109.21(c) (the “content prong”); and (3) satisfies at
18 least one of the conduct standards set forth in 11 C.F.R. § 109.21(d) (the “conduct prong”).

⁴⁸ 2 U.S.C. § 441b(a). As explained at greater length below, we further conclude that there is reason to believe that the Commission’s coordinated communication standard is satisfied and therefore that the corporate expenditure at issue here may have been coordinated.

⁴⁹ *Id.*

⁵⁰ See 11 C.F.R. § 109.23(a). The Complaint did not allege that Patriot Majority coordinated its communications with the Barrow or McKinley Committees. As a result, CELA did not provide notice to the Barrow and McKinley Committees or identify them as respondents in this matter. We make no recommendations concerning the Barrow or McKinley Committees in this Report.

1 Here, the payment prong of the coordinated communication test is satisfied because
2 Patriot Majority, a third party, paid for the advertisement.⁵¹ And the conclusion that Patriot
3 Majority republished the Chandler Committee's campaign materials satisfies the content prong.⁵²

4 Under the conduct prong of the Commission's coordinated communications regulation, if
5 a third party republishes campaign materials, the candidate or his authorized committee will be
6 deemed to have engaged in coordination with that person only if: (1) the communication was
7 created, produced, or distributed at the request or suggestion of a candidate or authorized
8 committee, or at the suggestion of the person paying for it and the candidate or authorized
9 committee assents; (2) the candidate or authorized committee was materially involved in specific
10 details of the communication, including its content, timing, and intended audience; or (3) the
11 communication was created after one or more substantial discussions between the person paying
12 for the communication and the candidate or his authorized committee or the candidate's
13 opponent or his authorized committee.⁵³

14 The Complaint asserts that the Commission may conclude that the republication was
15 coordinated based in part on its contention that the Chandler Committee uploaded and removed
16 that same day the video footage that Patriot Majority published in its advertisement five days
17 later. The allegation appears to be mistaken; it does not appear that the Chandler Committee in
18 fact removed the video clips after they were initially posted, and Respondents forcefully deny it,
19 noting that the video clips remain publicly available on the Chandler Committee's YouTube

⁵¹ See Patriot Majority Resp. at 1, 3.

⁵² See 11 C.F.R. § 109.21(c)(2); see 11 C.F.R. § 100.26.

⁵³ 11 C.F.R. § 109.21(d)(6) (citing 109.21(d)(1)-(3)).

1 channel. Based on this apparently mistaken factual allegation, the Respondents assert that the
2 Complainant "alleges none of the conduct necessary for coordination."⁵⁴

3 We disagree. Certainly the inference that the Chandler Committee requested or
4 suggested that Patriot Majority use the video clips in "Affordable," or assented to that use, would
5 have greater force were it true that the Chandler Committee removed the clips shortly after
6 posting them. But that is not the only indication of possibly coordinated conduct here. Taken
7 together, the following circumstances give rise to a reasonable inference that the Chandler
8 Committee may have requested or suggested that Patriot Majority republish its campaign
9 material or assented to that proposed use, or that it was materially involved in or substantially
10 discussed the communication with Patriot Majority.

11 *First*, the circumstances under which the Chandler Committee posted the footage tend to
12 suggest that such an exchange occurred. The footage does not appear to have served any
13 pending campaign purpose, as it involved an expired election cycle and contains no audio or
14 narrative. The Chandler Committee offers no explanation for having posted raw footage from
15 the 2010 election two years later. The very nature of the footage — discrete, generic clips of
16 Chandler interacting with constituents that could be placed wholesale in a narrative frame that
17 Patriot Majority used to support three different candidates — further supports the inference that
18 the Chandler Committee and Patriot Majority may have communicated about the clips.

19 *Second*, Patriot Majority apparently located the footage with relatively obscure titles,
20 incorporated it into "Affordable," and obtained television air time and broadcast the
21 advertisement only five days after the Chandler Committee first posted the footage. The rapidity

⁵⁴ Patriot Majority Resp. at 3 ("The complaint offers no other specific factual allegations on which to base a coordination claim."); Chandler Comm. Resp. at 3-4.

1 of the incorporation of the raw footage in an advertisement broadcast on television among a
2 similar series of advertisements mere days after it was made available tends to suggest some
3 level of consultation between the Chandler Committee and Patriot Majority concerning the video
4 footage and the advertisements that ultimately contained it.

5 *Third*, the reasonable inference of consultation between the entities stands unrefuted.⁵⁵
6 While the Responses assert that the advertisement is not a coordinated communication, they do
7 not address whether or in what manner the Chandler Committee and Patriot Majority
8 communicated about the video clips before Patriot Majority obtained and published that material
9 in its advertisement shortly after it was made available by the Committee.

10 *Fourth*, the substantial similarity of the circumstances surrounding the advertisement
11 featuring footage of Barrow also tends to establish a pattern of conduct that bolsters the inference
12 that Patriot Majority conferred with the Chandler Committee concerning the advertisement that
13 featured campaign material of Chandler. As noted, a similar non-narrative montage of silent
14 video clips of Barrow were uploaded by the Barrow Committee on June 19, 2012, the day after
15 Patriot Majority began airing its advertisements.⁵⁶ If the source of the footage of Barrow in
16 "Lifeline" was the same raw Barrow footage that the Barrow Committee later uploaded to
17 YouTube on June 19, 2012, that fact would reasonably suggest that Patriot Majority may have
18 communicated with all of the campaign committees whose video footage they incorporated in
19 the series of similar advertisements.

⁵⁵ See Statement of Reasons, Comm'rs Mason, Sandstrom, Smith & Thomas, MUR 4960 (Hillary Rodham Clinton for U.S. Senate Expl. Comm.) at 2 ("SOR").

⁵⁶ See *supra* note 18. The footage was also used for a 2010-cycle Barrow advertisement entitled "Street." See *supra* p. 6.

1 We note further that a reason to believe determination is not conclusive that an allegation
2 is true, but rather recognizes the seriousness of the allegations and provides an opportunity to
3 conduct an administrative fact-finding inquiry to resolve whether in fact a violation occurred.⁵⁷
4 Thus, the Commission previously has determined as a matter of policy that a reason-to-believe
5 finding is appropriate "in cases where the available evidence in the matter is at least sufficient to
6 warrant conducting an investigation."⁵⁸

7 Here, the narrow window in which Patriot Majority obtained, repackaged, and broadcast
8 the Chandler Committee footage in its "Affordable" advertisement, the otherwise inexplicable
9 purpose of placing silent footage of the candidate from a prior election cycle on the Chandler
10 Committee's YouTube channel immediately before the broadcast, the lack of any specific
11 refutation by the Respondents, and the apparent pattern of Patriot Majority's similar conduct
12 with other committees concerning the same series of nearly identical advertisements together
13 give rise to a reasonable deductive inference that the Chandler Committee may have suggested or
14 requested — or may have assented to a proposal — that the video footage be made available to
15 Patriot Majority for its use; or similarly, that the Chandler Committee was materially involved in
16 or engaged in substantial discussions concerning specific details of the "Affordable"
17 advertisement.⁵⁹ And if that inference is justified through further agency fact finding, then the

⁵⁷ See Statement of Policy Regarding Commission Act in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (A reason-to-believe finding indicates "only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred.").

⁵⁸ See *id.* (reason-to-believe finding appropriate where complaint "credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope").

⁵⁹ As to the "material involvement" and "substantial discussion" standards, the Commission has created a safe harbor that applies if "the information material to the creation, production, or distribution of the communication was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(2),(3). The person or organization that paid for the communication "bears the burden of showing that the information used in creating, producing or distributing the

1 Chandler Committee would have knowingly accepted a contribution under the Commission's
2 implementing regulation for republished materials.⁶⁰

3 As such, we recommend that the Commission find reason to believe that Patriot Majority
4 and the Chandler Committee coordinated the "Affordable" advertisement under 11 C.F.R.
5 § 109.21, resulting in the Chandler Committee's knowing acceptance of a prohibited in-kind
6 contribution in violation of 2 U.S.C. § 441b(a). And because the Chandler Committee did not
7 report the usual and normal value of Patriot Majority's communication as an in-kind
8 contribution, we further recommend that the Commission find reason to believe that the
9 Chandler Committee violated 2 U.S.C. § 434(b).⁶¹

10 III. INVESTIGATION

11 We propose to investigate whether Respondents' actions in connection with "Affordable"
12 in fact satisfy the conduct prong of the coordinated communication regulation. We will seek to

communication was obtained from a publicly available source." *Id.* Here, the reason-to-believe conclusion follows from the inference that the relevant "material involvement" or discussion occurred prior to the footage becoming publicly available — indeed, caused the Committee to make it available. Thus, the exemption would not apply. Moreover, the safe harbor would not apply to the "request or suggestion" standard in any event. *See id.* § 109.21(d)(1).

⁶⁰ It may well be that further agency fact finding reveals that the parties or their agents did not communicate about the footage, or if they did, that the Chandler Committee did not suggest, request, or assent to a proposal that the Chandler Committee make the footage available for Patriot Majority's use or otherwise materially involve itself in the production of the advertisement. Indeed, as early as June 2012, news sources reported on the development of a general practice among some committees to upload useful video footage to publicly accessible internet sites to assist third parties that might wish to create favorable advertisements without engaging in conduct covered by the Commission's coordinate communication regulation. *See, e.g.,* Nathan A. Gonzales, *IE Strategy Borders on Art Form*, ROLL CALL (Jun. 7, 2012), http://www.rollcall.com/issues/57_147/IE-Strategy-Borders-on-Art-Form-215138-1.html. That an investigation ultimately may not yield affirmative evidence of a violation, however, does not make the allegation speculative or suggest that there is not a reason to believe a violation may have occurred here -- indeed, for the reasons explained above, the pre-investigative record in this matter reasonably suggests that such discussion or involvement may have occurred. At the preliminary stage of a Commission administrative proceeding, that determination provides the agency an adequate basis to seek further information in response to a lawfully filed administrative complaint. *See* 72 Fed. Reg. at 12,545.

⁶¹ Under Commission regulations, a candidate and its authorized committee "with whom or which a communication paid for by another person is coordinated must report the usual and normal value of the communication as an in-kind contribution" as both a receipt and an expenditure. 11 C.F.R. § 109.21(b)(3).

1 obtain information concerning the Chandler Committee's decision to place the relevant video
2 clips on its YouTube channel, its communications with Patriot Majority concerning the clips or
3 the subsequent advertisement that incorporated that footage, and the timing and expense of
4 Patriot Majority's televised broadcast of the advertisements that are the subject of the Complaint.
5 We also will seek further information concerning Patriot Majority's dealings with the Barrow
6 and McKinley Committees, both as to the substantive allegation that Patriot Majority republished
7 campaign materials of those committees, and as evidence of a pattern of conduct relating to its
8 possible coordination with the Chandler Committee. We will seek to conduct our investigation
9 through voluntary means, but recommend that the Commission authorize the use of compulsory
10 process as necessary.

11 **IV. RECOMMENDATIONS**

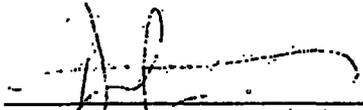
- 12 1. Find reason to believe that Patriot Majority USA violated 2 U.S.C. § 441b(a), by
13 making a prohibited in-kind corporate contribution to Chandler for Congress
14 Committee as a result of republishing campaign materials.
15
16 2. Find reason to believe that Patriot Majority USA violated 2 U.S.C. § 441b(a), by
17 making a prohibited in-kind corporate contribution to Friends of John Barrow as a
18 result of republishing campaign materials.
19
20 3. Find reason to believe that Patriot Majority USA violated 2 U.S.C. § 441b(a), by
21 making a prohibited in-kind corporate contribution to McKinley for Congress as a
22 result of republishing campaign materials.
23
24 4. Find reason to believe that Chandler for Congress Committee and R. Wayne
25 Stratton in his official capacity as treasurer, knowingly accepted a prohibited in-
26 kind corporate contribution in violation of 2 U.S.C. § 441b(a).
27
28 5. Find reason to believe that Chandler for Congress Committee and R. Wayne
29 Stratton in his official capacity as treasurer, violated 2 U.S.C. § 434(b).
30
31 6. Approve the attached Factual and Legal Analyses.
32
33 7. Authorize the use of compulsory process, including the issuance of appropriate
34 interrogatories, document subpoenas, and deposition subpoenas, as necessary.
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8. Approve the appropriate letters.

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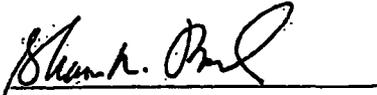
Date

BY: 

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Associate General Counsel for Enforcement



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Assistant General Counsel



Shana M. Broussard
Attorney